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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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4 ADONAI EL-SHADDAI,
AKA JAMES RAY WILKERSON,
5 Plaintiff,
6 v.
7 WILLIAM MUNIZ, et al.,
8 Defendants.

Case No. [18-cv-06879-YGR](#) (PR)

**ORDER OF SERVICE; GRANTING
PLAINTIFF'S MOTION FOR LEAVE
TO FILE SECOND AMENDED
COMPLAINT; AND DENYING HIS
MOTION FOR PRELIMINARY
INJUNCTION AND/OR TRO AS
PREMATURE**

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I. INTRODUCTION

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Plaintiff, a state prisoner who is incarcerated at Salinas Valley State Prison (“SVSP”), has filed a *pro se* action under 42 U.S.C. § 1983 seeking injunctive, declaratory, and monetary relief over the infringement of his right to practice his religion, which he claims is the “Messianic Kabbalistic¹ Order of Melchizedek.” Dkt. 1 at 14.² Plaintiff claims the “aim of the Messianic Kabbalistic Order of Melchizedek is to teach the Kabbalistic Science of Occult Knowledge, the Pure and Holy Magick [sic] of Light, the secrets of M[ys]tic attainment of the Secret Wisdom of the Ancients, after the Messianic Kabbalistic Order of Melchizedek.” *Id.*

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Plaintiff has filed a motion for leave to proceed *in forma pauperis*, which will be granted in a separate written Order.

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Venue is proper because the events giving rise to the claim are alleged to have occurred at SVSP, which is located in this judicial district. *See* 28 U.S.C. § (b).

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Now before the Court is Plaintiff’s motion for leave to file a second amended complaint (“SAC”).³ Dkt. 15. He has submitted a proposed SAC with the motion. Dkt. 15-1. Plaintiff has

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¹ In order to elaborate on the “Kabbalistic Religion,” Plaintiff explains that “Kabbalah is Jewish Mysticism.” Dkt. 15-1 at 10.

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² Page number citations refer to those assigned by the Court’s electronic case management filing system and not those assigned by Plaintiff.

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³ The Court notes that Plaintiff has previously filed his original and amended complaint. Dkts. 1, 6. His previously-filed motion for leave to file an amended complaint is TERMINATED as moot (dkt. 5) because of his current pending motion for leave to amend (dkt. 15), which has been construed as a motion for leave to file a *second* amended complaint.

1 also filed motions for a preliminary injunction and/or a temporary restraining order (“TRO”).
2 Dkts. 7, 16.

3 **II. PENDING MOTIONS**

4 **A. Motion for Leave to File SAC**

5 Under Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend the party’s
6 pleading once as a matter of course within 21 days after serving it or, if the pleading is one to
7 which a responsive pleading is required, within 21 days after service of a responsive pleading.
8 Fed. R. Civ. P. 15(a). Otherwise, a party may amend only by leave of the court or by written
9 consent of the adverse party. Fed. R. Civ. P. 15(b). Federal Rule of Civil Procedure 15(a) is to be
10 applied liberally in favor of amendments and, in general, leave shall be freely given when justice
11 so requires. *See Janicki Logging Co. v. Mateer*, 42 F.3d 561, 566 (9th Cir. 1994). There is no
12 indication that Plaintiff’s motion is sought in bad faith, constitutes an exercise in futility, or creates
13 undue delay. *See id.* Nor is there any suggestion that allowing Plaintiff to file his proposed SAC
14 would cause defendants any undue prejudice. *See id.* Accordingly, Plaintiff’s motion for leave to
15 file a second amended complaint is GRANTED. Dkt. 15. The Clerk of the Court shall file
16 Plaintiff’s SAC, as directed below. The SAC is now the operative pleading and is before the
17 Court for review under 28 U.S.C. § 1915A.

18 **B. Motion for a Preliminary Injunction and/or TRO**

19 Plaintiff has also filed motions for a preliminary injunction and/or TRO. Dkts. 7, 16.
20 Federal Rule of Civil Procedure 65 sets forth the procedure for issuance of a preliminary
21 injunction or TRO. Prior to granting a preliminary injunction, notice to the adverse party is
22 required. *See Fed. R. Civ. P. 65(a)(1).* Therefore, a motion for preliminary injunction cannot be
23 decided until the parties to the action are served. *See Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir.
24 1983). A TRO may be granted without written or oral notice to the adverse party or that party’s
25 attorney only if: (1) it clearly appears from specific facts shown by affidavit or by the verified
26 complaint that immediate and irreparable injury, loss or damage will result to the applicant before
27 the adverse party or the party’s attorney can be heard in opposition, and (2) the applicant’s
28 attorney certifies in writing the efforts, if any, which have been made to give notice and the

1 reasons supporting the claim that notice should not be required. *See* Fed. R. Civ. P. 65(b). The
2 motions (dkts. 7, 16) are DENIED as premature because the parties to this action have not yet
3 been served, and Plaintiff has failed to satisfy either of the criteria under Rule 65(b) for granting a
4 TRO without notice to the adverse parties. *Id.*

5 **III. DISCUSSION**

6 **A. Standard of Review**

7 A federal court must conduct a preliminary screening in any case in which a prisoner seeks
8 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
9 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims
10 that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek
11 monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b)(1), (2). *Pro se*
12 pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
13 Cir. 1988).

14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements,
15 namely that: (1) a right secured by the Constitution or laws of the United States was violated, and
16 (2) the alleged violation was committed by a person acting under the color of state law. *West v.*
17 *Atkins*, 487 U.S. 42, 48 (1988).

18 **B. Plaintiff’s Claims**

19 In the SAC, Plaintiff claims that he is the “inmate facilitator of the Kabbalistic Studies and
20 Meditation” at SVSP. Dkt. 15-1 at 14. He adds that “[a]s a metaphysical practitioner, Ritual
21 Herbal Smoke Blend⁴ [is] utilized in ceremoniously as a sacrament with mystical [o]bservance and
22 magickal [sic] enchantment when engaged in magickal [sic] rites, are used as a way to encourage
23 intuition, clairvoyance or psy[c]hic attention.” *Id.*

24 On July 30, 2017, Plaintiff alleges that he “received a Religious Special Purchase [of] four
25 ounces of approved Kinni-Kinnick Ceremonial Tobacco,” which was immediately confiscated as
26 contraband. *Id.* at 5. Plaintiff claims that he informed Defendants that he “ha[d] an ex[c]eption to

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28 ⁴ Plaintiff explains that Ritual Herbal Smoke Blend “includes tobacco, cannabis and hashish.” Dkt. 15-1 at 4.

1 receive[] and possess Ritual Herbal Smoke Blends pursuant to Directive IAB Case No. 1410572
2 and LAC-13-02830.” *Id.* However, Defendants “refus[ed] to issue [Ritual] Herbal Smoke Blends
3 after receiv[ing] three directive[s] to issue in Second Level Appeal Response #18-02234, Third
4 Level Appeal Response 1807639 and Appeal LAC-B-13-02958.” *Id.* at 14-15. Plaintiff claims
5 that the Ritual Herbal Smoke Blend is “essential, necessary, and central to the exercise and
6 practice of his Faith.” *Id.* at 15.

7 Plaintiff alleges that Defendants have substantially burdened the practice of his religion by
8 denying him the use of tobacco (i.e., Kinni-Kinnick Ceremonial Tobacco or Ritual Herbal Smoke
9 Blend) in religious rituals. Liberally construed, Plaintiff’s allegations appear to state cognizable
10 section 1983 claims for violation of his First and Fourteenth Amendment rights to free exercise of
11 religion and due process/equal protection. *See, e.g., Freeman v. Arpaio*, 125 F.3d 732, 736 (9th
12 Cir. 1997) (prison officials may not burden the practice of prisoner’s religion, by preventing him
13 from engaging in conduct mandated by his faith, without any justification reasonably related to
14 legitimate penological interests). These allegations also implicate the Religious Land Use and
15 Institutionalized Persons Act (“RLUIPA”), which provides: “No government shall impose a
16 substantial burden on the religious exercise of a person residing in or confined to an institution, as
17 defined in section 1997 [which includes state prisons, state psychiatric hospitals, and local jails],
18 even if the burden results from a rule of general applicability, unless the government demonstrates
19 that imposition of the burden on that person (1) is in furtherance of a compelling governmental
20 interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”
21 42 U.S.C. § 2000cc-1(a).

22 In addition, Plaintiff alleges that Defendants’ aforementioned actions in violation of his
23 federal constitutional rights also violate various provisions of California constitutional and
24 statutory law. The federal supplemental jurisdiction statute provides that ““district courts shall
25 have supplemental jurisdiction over all other claims that are so related to claims in the action
26 within such original jurisdiction that they form part of the same case or controversy under Article
27 III of the United States Constitution.”” 28 U.S.C. § 1337(a). Plaintiff asserts supplementary state
28 law claims that the actions of Defendants violated rights afforded to him by California

1 constitutional and statutory law. Liberally construed, Plaintiff's allegations satisfy the statutory
2 requirement. Therefore, the Court exercises supplemental jurisdiction over his state law claims.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the Court orders as follows:

5 1. Plaintiff's motion for leave to file a second amended complaint is GRANTED.
6 Dkt. 15.⁵ The Clerk is directed to file the document attached to Plaintiff's motion, which is
7 labeled "Amended Complaint Under the Civil Rights Act 42 U.S.C. § 1983," and docket the
8 aforementioned document as Plaintiff's "Second Amended Complaint." *See* Dkt. 15-1. The Clerk
9 is further directed to mark the SAC as filed on February 25, 2019, the date it was received by the
10 Court.

11 2. Plaintiff's motions for a preliminary injunction and/or TRO are DENIED as
12 premature. Dkts. 7, 16.

13 3. Plaintiff's allegations appear to state cognizable section 1983 claims for violation
14 of his First and Fourteenth Amendment rights to free exercise of religion and due process/equal
15 protection. These allegations also implicate RLUIPA.

16 4. The Court will exercise supplemental jurisdiction over Plaintiff's state law claims.

17 5. The Clerk shall mail a Notice of Lawsuit and Request for Waiver of Service of
18 Summons, two copies of the Waiver of Service of Summons, a copy of the SAC and all
19 attachments thereto (dkt. 15-1), and a copy of this Order to the following Defendants at SVSP:
20 **Wardens William Muniz and T. Foss; Acting Warden S. Hatton; Chief Deputy Wardens J.**
21 **Stein and Captain R. Binkele; Religious Review Committee Chairperson J. McCall;**
22 **Community Resources Manager Carol Hernandez; Inmate Appeals Chief M. Voong;**
23 **Correctional Officers C. Lopez, P. Sullivan, R. Gamboa, A. Ware, M. Barroso, J. Young, H.**
24 **Corona, and T. Frost.** The Clerk shall also mail a copy of the complaint and a copy of this Order
25 to the California State Attorney General's Office. Additionally, the Clerk shall mail a copy of this

27 28 ⁵ As mentioned above, Plaintiff's previously-filed motion for leave to file an amended
complaint is TERMINATED as moot (dkt. 5) because of his current pending motion for leave to
amend (dkt. 15), which has been construed as a motion for leave to file a second amended
complaint.

1 Order to Plaintiff.

2 6. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure
3 requires them to cooperate in saving unnecessary costs of service of the summons and complaint.
4 Pursuant to Rule 4, if Defendants, after being notified of this action and asked by the Court, on
5 behalf of Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the
6 cost of such service unless good cause can be shown for their failure to sign and return the waiver
7 form. If service is waived, this action will proceed as if Defendants had been served on the date
8 that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required
9 to serve and file an answer before **sixty (60) days** from the date on which the request for waiver
10 was sent. (This allows a longer time to respond than would be required if formal service of
11 summons is necessary.) Defendants are asked to read the statement set forth at the foot of the
12 waiver form that more completely describes the duties of the parties with regard to waiver of
13 service of the summons. If service is waived after the date provided in the Notice but before
14 Defendants have been personally served, the Answer shall be due **sixty (60) days** from the date on
15 which the request for waiver was sent or **twenty (20) days** from the date the waiver form is filed,
16 whichever is later.

17 7. Defendants shall answer the complaint in accordance with the Federal Rules of
18 Civil Procedure. The following briefing schedule shall govern dispositive motions in this action:

19 a. No later than **sixty (60) days** from the date their answer is due, Defendants
20 shall file a motion for summary judgment or other dispositive motion. The motion must be
21 supported by adequate factual documentation, must conform in all respects to Federal Rule of
22 Civil Procedure 56, and must include as exhibits all records and incident reports stemming from
23 the events at issue. A motion for summary judgment also must be accompanied by a *Rand*⁶ notice
24 so that Plaintiff will have fair, timely, and adequate notice of what is required of him in order to
25 oppose the motion. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out
26 in *Rand* must be served concurrently with motion for summary judgment). A motion to dismiss
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28 ⁶ *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998).

1 for failure to exhaust available administrative remedies must be accompanied by a similar notice.
2 However, the Court notes that under the new law of the circuit, in the rare event that a failure to
3 exhaust is clear on the face of the complaint, Defendants may move for dismissal under Rule
4 12(b)(6), as opposed to the previous practice of moving under an unenumerated Rule 12(b)
5 motion. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc) (overruling *Wyatt v.*
6 *Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), which held that failure to exhaust available
7 administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (“PLRA”),
8 should be raised by a defendant as an unenumerated Rule 12(b) motion). Otherwise, if a failure to
9 exhaust is not clear on the face of the complaint, Defendants must produce evidence proving
10 failure to exhaust in a motion for summary judgment under Rule 56. *Id.* If undisputed evidence
11 viewed in the light most favorable to Plaintiff shows a failure to exhaust, Defendants are entitled
12 to summary judgment under Rule 56. *Id.* But if material facts are disputed, summary judgment
13 should be denied and the district judge, rather than a jury, should determine the facts in a
14 preliminary proceeding. *Id.* at 1168.

15 If Defendants are of the opinion that this case cannot be resolved by summary judgment,
16 they shall so inform the Court prior to the date the summary judgment motion is due. All papers
17 filed with the Court shall be promptly served on Plaintiff.

18 b. Plaintiff’s opposition to the dispositive motion shall be filed with the Court
19 and served on Defendants no later than **twenty-eight (28) days** after the date on which
20 Defendants’ motion is filed.

21 c. Plaintiff is advised that a motion for summary judgment under Rule 56 of
22 the Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you
23 must do in order to oppose a motion for summary judgment. Generally, summary judgment must
24 be granted when there is no genuine issue of material fact—that is, if there is no real dispute about
25 any fact that would affect the result of your case, the party who asked for summary judgment is
26 entitled to judgment as a matter of law, which will end your case. When a party you are suing
27 makes a motion for summary judgment that is supported properly by declarations (or other sworn
28 testimony), you cannot simply rely on what your complaint says. Instead, you must set out

1 specific facts in declarations, depositions, answers to interrogatories, or authenticated documents,
2 as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and
3 documents and show that there is a genuine issue of material fact for trial. If you do not submit
4 your own evidence in opposition, summary judgment, if appropriate, may be entered against you.
5 If summary judgment is granted, your case will be dismissed and there will be no trial. *Rand*, 154
6 F.3d at 962-63.

7 Plaintiff also is advised that—in the rare event that Defendants argue that the failure to
8 exhaust is clear on the face of the complaint—a motion to dismiss for failure to exhaust available
9 administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your case, albeit without
10 prejudice. To avoid dismissal, you have the right to present any evidence to show that you did
11 exhaust your available administrative remedies before coming to federal court. Such evidence
12 may include: (1) declarations, which are statements signed under penalty of perjury by you or
13 others who have personal knowledge of relevant matters; (2) authenticated documents—

14 documents accompanied by a declaration showing where they came from and why they are
15 authentic, or other sworn papers such as answers to interrogatories or depositions; (3) statements
16 in your complaint insofar as they were made under penalty of perjury and they show that you have
17 personal knowledge of the matters state therein. As mentioned above, in considering a motion to
18 dismiss for failure to exhaust under Rule 12(b)(6) or failure to exhaust in a summary judgment
19 motion under Rule 56, the district judge may hold a preliminary proceeding and decide disputed
20 issues of fact with regard to this portion of the case. *Albino*, 747 F.3d at 1168.

21 (The notices above do not excuse Defendants' obligation to serve similar notices again
22 concurrently with motions to dismiss for failure to exhaust available administrative remedies and
23 motions for summary judgment. *Woods*, 684 F.3d at 935.)

24 d. Defendants shall file a reply brief no later than **fourteen (14) days** after the
25 date Plaintiff's opposition is filed.

26 e. The motion shall be deemed submitted as of the date the reply brief is due.
27 No hearing will be held on the motion unless the Court so orders at a later date.

28 8. Discovery may be taken in this action in accordance with the Federal Rules of Civil

1 Procedure. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to Defendants to
2 depose Plaintiff and any other necessary witnesses confined in prison.

3 9. All communications by Plaintiff with the Court must be served on Defendants or
4 their counsel, once counsel has been designated, by mailing a true copy of the document to them.

5 10. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
6 informed of any change of address and must comply with the Court's orders in a timely fashion.
7 Pursuant to Northern District Local Rule 3-11, a party proceeding *pro se* whose address changes
8 while an action is pending must promptly file a notice of change of address specifying the new
9 address. *See* L.R. 3-11(a). The Court may dismiss without prejudice a complaint when: (1) mail
10 directed to the *pro se* party by the Court has been returned to the Court as not deliverable, and
11 (2) the Court fails to receive within sixty days of this return a written communication from the *pro*
12 *se* party indicating a current address. *See* L.R. 3-11(b).

13 11. Upon a showing of good cause, requests for a reasonable extension of time will be
14 granted provided they are filed on or before the deadline they seek to extend.

15 12. This Order terminates Docket Nos. 5, 7, 15 and 16.

16 IT IS SO ORDERED.

17 Dated: April 11, 2019


18 YVONNE GONZALEZ ROGERS
19 United States District Judge

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